84-293 (1)

No. .....

Office - Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN FERNEDING,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION, ET AL.,

Appellee.

On Appeal From The Supreme Court of Ohio

STATEMENT OF JURISDICTION

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25PP

QUESTIONS PRESENTED

1. Whether Or Not Grant of Defendant's Motion For Summary Judgment In A FELA Action Absent Express Reliance Upon Adequate and Independent State Grounds In The Judgment Provides Sufficient Federal Questions To Establish Jurisdiction of This Court For Purpose Of Appeal.

2. Whether Or Not State Courts' Grant Of Summary Judgment In A FELA Action, Resulting From Evaluation Of Evidence By A Lesser Standard Than That Required By Federal Courts In Similar Actions Deprived Appellant Of His Right To Have The Federal Right Determined By Federal Law In State Court According To The Supremacy Clause Found In Article VI Of The Constitution Of The United States.

Please note: Appellant's action against named co-defendant William Tarvin, is still pending in the Court of Common Pleas, Hamilton County, Ohio, Case No. A8110286

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. .....

JOHN FERNEDING,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION, ET AL.,

Appellee.

On Appeal From The Supreme Court of Ohio

JURISDICTIONAL STATEMENT – STATE CIVIL CASE

PETITION

Appellant John W. Ferneding respectfully appeals to this Court for review of the judgment and decision of the Supreme Court of Ohio denying Appellant's Motion to Certify the Record of the First District Court of Appeals, and for removal of this matter to the trial court for further proceedings.

OPINIONS BELOW

The judgment of the Court of Appeals for the First Appellate District of Ohio, rendered November 23, 1983, is unreported and appears as Appendix A to this document (post. at p. 1a.) The decision of the Ohio Supreme Court refusing review of this case in its denial of Appellant's Mo-

tion to Certify entered March 21, 1984, is appended hereunto as Appendix B.

JURISDICTIONAL GROUNDS IN THIS COURT

The final order and appealable order of the Supreme Court of Ohio denying review of this matter was rendered March 21, 1984.

The jurisdiction of this Court to review this decision on appeal is conferred by 28 U.S.C. § 1257 (2). As the only remedy available to Appellant was to initiate action in tort under the provisions of 45 U.S.C. § 51, the existence of questions of federal import has been facially present at all times to each court which has reviewed this matter; the fact that a federal question has not been formally raised in previous pleadings has not been held to be fatal to a timely appeal arising out of the underlying federal question. The following decisions sustain the jurisdiction of the Supreme Court to review this matter at this juncture: *Martinez* v. *California,* 444 U.S. 277 (1979); *Zacchini* v. *Scripps Howard Broadcasting Company,* 433 U.S. 562 (1977); *Cooper* v. *Mitchell Brothers Santa Ana Theatres,* 454 U.S. 90, (1981), reh'g denied, 103 S. Ct. 259.

CONSTITUTIONAL AND STATUTORY PROVISIONS

ARTICLE 6, U.S. CONSTITUTION,
(Supremacy Clause)

FEDERAL RULES OF CIVIL PROCEDURE
RULE 56 SUMMARY JUDGMENT

> (c) The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

OHIO RULES OF CIVIL PROCEDURE
RULE 56: SUMMARY JUDGMENT

> (c) . . . a summary judgment shall not be rendered unless it appears . . . that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the Motion for Summary Judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

STATEMENT OF THE CASE

This appeal arises from an Order of the Court of Common Pleas, Hamilton County, Ohio which on January 5, 1983, granted Appellee Consolidated Rail Corporation (Conrail) a Motion for Summary Judgment, finding that the egregious acts of co-defendant William Tarvin, a Conrail employee and the Appellant's foreman, toward the Appellant could only be considered by reasonable men to have been outside the course of his employment. This decision was timely appealed, and was affirmed by the First Appellate District Court of Appeals on November 23, 1983. Notice of appeal to the Supreme Court of Ohio was timely filed on December 21, 1983; the Supreme Court denied Appellant's Motion to Certify in an Order dated March 21, 1984. At all times and before all courts the gravamen of this action was a claim under 45 USC § 51.

On February 26, 1981, Appellant John Ferneding was employed by Consolidated Rail Corporation (Conrail) and was under the supervision of William Tarvin, co-defendant of this action. Midway through his 3:30 p.m. to 11:30 p.m. shift, at approximately 8:00 p.m., Ferneding who had apparently been having difficulty in performing

his duties, received a telephone call from Tarvin directing him to perform specific work tasks.

Shortly thereafter, Tarvin a salaried employee who was on call 24 hours a day, presented himself at the signal shop where Ferneding was stationed. Tarvin was operating on specific instruction from his supervisor Al Hendershot, to check upon Appellant. Tarvin had admittedly been drinking that evening as was his custom; it was apparently common practice among the yard supervisors. In fact, one of the "problems" discussed with Appellant during the incident was his reporting of an on the job drinking incident to the railroad police two night earlier, when Hendershot, Tarvin's supervisor, had been called in to "investigate" Ferneding's allegation.

Tarvin put the gun which he customarily carried during the course of his employment to Ferneding's temple. For approximately the next four hours, Tarvin, keeping Ferneding's attention by periodically directing the loaded weapon to Ferneding's head, would discourse on Appellant's job performance and upon his shortcomings as an employee. Tarvin testified that the "purpose" of the incident was to "straighten things out" with Ferneding, as he had been instructed to do by the yard supervisor, Al Hendershot.

At no time during the ordeal did Tarvin discuss anything other than matters connected with their mutual employment. Tarvin testified that he had been assigned the "dirty work" of getting Ferneding "straightened out". Tarvin's actions were as a result of his "company's displeasure", rather than his own displeasure with Ferneding.

In response to counsel's question as to whether or not Tarvin felt that the incident was related to Tarvin's employment, Tarvin stated: "Yes sir. I mean I had no per-

sonal problems with that man". (Plaintiff's Deposition 7-22-1982, p. 107).

As a result of the trauma of the incident, Appellant Ferneding suffered and is still suffering emotional and financial damages which can now only be appropriately redressed by action of this court.

REASONS WHY ISSUES HEREIN ARE SUBSTANTIAL

I. FEDERAL QUESTION JURISDICTION CAN BE PRESUMED FROM APPARENT RELIANCE UPON THE FEDERAL QUESTION BY THE STATE COURT.

In almost every instance in which a federal question used to establish jurisdiction in the Supreme Court has not been expressly relied upon by the state court in their review of the matter, it is the Appellant's responsibility to establish jurisdiction to the satisfaction of this Court. The federal question raised by this appeal is the application of the correct standard of review of the evidence by the trial court in its grant of summary judgment for Defendant-Appellee Conrail. *Wilkerson* v. *McCarthy,* 336 U.S. 53 (1949). Although the Ohio trial court did not formally express its consideration of federal law in its decision, still the federal question which here establishes jurisdiction exists.

This Court has never required a state court decision to be cast solely in terms of the federal question in order to preserve an issue for appeal. *Martinez* v. *California,* 444 U.S. 277 (1979); *Zacchini* v. *Scripps Howard Broadcasting Company,* 433 U.S. 562, (1977). Where only one issue of fact and law are presented on appeal, jurisdiction

has been necessarily found. *Cooper* v. *Mitchell Brothers Santa Ana Theatre*, 454 U.S. 90, (1981), reh'g denied, 103 S. Ct. 259. Presented here is just such a single issue case. Because the law that governs is the Federal Employer's Liability Act (hereafter "FELA") 45 U.S.C. 51 et seq. jurisdiction in this Court is established as a matter of right, where as here, the decision by the state supreme court involves a single federal issue.

Recently this Court has ruled that there is a presumption in favor of jurisdiction in cases where it is facially apparent from the judgment that a state court relied upon a federal question in its judgment. *Michigan* v. *Long*, — U.S. —, 103 S. Ct. 3469, 77 L.Ed.2d 120 (1983). In that case Justice Sandra Day O'Connor, writing for the Court, ruled that jurisdiction will be assumed in such cases unless the state court "plainly stated" its intention to rely upon adequate and independent state grounds. Thus, no longer is this Court required to second guess the intentions of the state court based upon a judgment that does not direct itself specifically to the federal issue.

Clearly the rationale supporting the holding, if not the rule, of *Michigan* v. *Long*, 103 S. Ct. 3469, 77 L.Ed.2d 120 (1983), deserves retrospective application to the facts presented here. Its purpose, improved economy and efficiency of judicial administration, is needed in this case, as in others. *Hopt* v. *Utah*, 110 U.S. 574 (1884). Based upon *Michigan*, jurisdiction here is apparent as a result of the state court's reliance upon some, albeit unarticulated, standard of review of the evidence in granting summary judgment. If this Court however, chooses to avoid retrospective application of *Michigan* v. *Long*, 103 S. Ct. 3469, 77 L.Ed.2d 120 (1983), then nonetheless it should find jurisdiction in this case as no state ground is apparent

as the basis for the decision, much less an adequate and independent one. Under the traditional rule, it has been held that in actions brought under 45 U.S.C. § 51, sufficiency of evidence considered by state courts is a formally reviewable question. *Shellhammer* v. *Lehigh Val. R. Co.*, (N.J. 1954), 102 A.2d 602, 14 N.J. 341, cert. denied, 347 U.S. 990, reh'g denied, 348 U.S. 852.

Specifically, federal decisions are clearly to be considered to govern questions of sufficiency of evidence, type of proof necessary for judgment, and issues of proof brought under FELA. *Overstreet* v. *Atlantic Coastline R. Co.*, (Fla. App. 1963), 152 So.2d 188, 96 A.L.R.2d 649. It is the failure of the state court here to apply the correct standard of proof in its grant of summary judgment which further justifies consideration of this court, as is further discussed below.

II. THE TRIAL COURT AND APPELLATE COURTS AT THE STATE LEVEL ERRED IN THEIR APPLICATION OF THE WRONG STANDARD OF EVIDENTIARY REVIEW IN GRANTING AND AFFIRMING SUMMARY JUDGMENT.

Appellant complained of duty, breach of duty, and causation to claim damage jointly and severally from Defendant-Appellees in this action. Appellant testified at deposition that Appellee's supervisor, Tarvin, assaulted him with a gun and intimidated him with verbal abuse during a four hour imprisonment in the railroad yard. Appellant testified further that the resulting shock has caused him to lose sleep and to be unable to work. Appellant's claim against the Appellee is based upon these ultimate

facts, and the direct attributions of responsibility to the Appellee by Appellant's testimony that the tortfeasor customarily carried a gun in scope of his employment and routinely and verbally intimidated and harrassed his subordinates.

The error of the state court's grant and affirmation of summary judgment in this action was two-fold. First, the dismissal of the Appellant's case on the theory that the tortfeasor acted without the scope of his employment was based on an erroneous interpretation of the FELA cause of action. Furthermore, it was improper to weigh the credibility of Appellant's circumstantial proof against him on the motion for summary judgment. *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949).

Under the decisions of this Court, a jury verdict against the employer under FELA is sustained, and ipso facto, the pleading stating the cause of action is upheld, by a showing of circumstances tending to prove that the employer negligently caused the injuries suffered by a railroad employee. *Rogers* v. *Missouri-Pacific R.R. Co.*, 352 U.S. 500 (1957). As stated by this Court:

> . . . for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference. *Rogers* v. *Missouri-Pacific Railway Co.*, 352 U.S. 500 at 508 (1957).

Appellant certainly showed sufficient circumstantial evidence against the Appellee that with undisputed testi-

mony that Tarvin customarily carried a gun on the job and routinely harrassed and drank on the job with the acquiescence of his supervisors. *Harrison* v. *Missouri-Pacific Railroad Co.*, 372 U.S. 248 (1963). It was improper for the state courts to consider any other issue than the proof of the Appellee's negligence, under the law.

In Appellant's deposition, there was clear proof of Appellee's negligence in retaining a vicious and ill-tempered employee to remain in its employment. Appellant's cause of action is supported by precedent from this Court allowing a damages recovery under the FELA for the employer's negilgent failure to prevent an assault by a co-employee. *Harrison* v. *Missouri-Pacific Railroad Co.*, 372 U.S. 248 (1963). As this Court stated in that case:

> That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nevertheless had a duty to make reasonable provision against it. *Id.* at 249.

There are numerous precedents holding that an employer may be responsible under the FELA for the negligent hiring or retention of a vicious and dangerous employee who assaults another employee. *Harrison* v. *Missouri R.R. Co.*, 372 U.S. 248 (1963); *Atlantic Coastline R.R. Co.* v. *Southwell*, 275 U.S. 64 (1947); *Najera* v. *Southern Pacific Railway Co.*, 13 Cal. Rptr. 146, 191 Cal. App.2d 634 (1961); *Tatham* v. *Wabash Railway*, 412 Ill. 606, 107 N.E.2d 735 (1952). Causes of action have also been recognized for injuries arising from the accidental discharge of a gun belonging to another employee. *Baker* v. *B & O Railway Co.*, 502 F.2d 638 (6th Cir. 1974). and even for foreseeable danger from the criminal acts of third persons, *Lillie* v. *Thompson*, 332 U.S. 459, (1947). That the evidence against the Appellee here-

in, Conrail, is circumstantial makes no difference to the Appellant's cause of action according to the precedent cited herein. The Appellant's case is reinforced by the presumption that the FELA employer knows of events customarily occurring at the place of business. *Miller* v. *Cincinnati Railway*, 317 F.2d 693 (6th Cir. 1963).

It was therefore clear in both the trial and appellate courts that Appellant had established a cause of action against the Appellee based upon circumstantial evidence. Once the Plaintiff-Appellant had established his cause of action by this much evidence in a FELA action, the trial court committed reversible error by dismissing the action without a jury trial since the credibility of Plaintiff-Appellant's evidence may not be weighed against him before trial. *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949). The numerous cases reversed on this same point by this Court establish the truth of this proposition beyond all doubt. Reversal is required in this case. *See*, *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949); *Lillie* v. *Thompson*, 332 U.S. 459, (1947); *Cogswell* v. *Chicago & Erie R.R. Co.*, 328 U.S. 820 (1946); *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29 (1944).

This policy in favor of allowing the FELA Plaintiff to get to the jury with the bare minimum of probative evidence should not be lightly disturbed without good reason. *Rogers* v. *Missouri-Pacific R.R. Co.*, 352 U.S. 500 (1957). Certainly, there is every reason in this case to allow the Plaintiff-Appellant to get to the jury and nothing to warrant an exception to the general rule.

The Plaintiff-Appellant's right to a full day in court on summary judgment, which is treated with respect in FELA law, is at stake here. *Streeter* v. *Erie Railroad*, 25

F.R.D. 272 (S.D.N.Y. 1960). Although it was originally said in a different context, the following comment on the day in court could just as easily have been made in this FELA case:

> "[A] litigant should not be easily deprived of his day in court except upon a clear showing that he presents no admissable evidence which is worthy of consideration by a jury or other trier of fact." *Manok* v. *Southwest District Bowling Association,* 306 F.Supp. 1215 at 1219 (C.D. Cal. 1969).

In the interests of justice, this Court should correct the deprivation that Appellant suffered when he was, by a grant of summary judgment, denied and in effect deprived of his right to have the federal right determined by federal law in state court according to the Supremacy Clause of the U.S. Constitution. In the case of *Harrison* v. *Missouri-Pacific R.R. Co.,* 372 U.S. 248, (1963), Plaintiff-Appellant had the opportunity to depose the Appellee's agents. Only a reversal of the summary judgment will give Appellant his first full opportunity to discover Appellee's officers, directors and in particular, its managing agents at the affected railroad yard.

CONCLUSION

Clearly Appellant produced sufficient evidence of negligence to support a jury verdict against the Appellee. Certainly it was sufficient to defeat a Motion for summary judgment.

In FELA actions, the credibility of the evidence produced by Plaintiff-Appellant, however slight its bearing on the case, may not be weighed against him on a motion to dismiss before trial.

The Court is respectfully urged to review this case, to reverse the judgment below, and to remand with instructions to provide Appellant an opportunity to complete discovery and to proceed with a trial on the merits of the case.

Respectfully submitted.

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APPELLANT

APPENDIX "A"

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-830038
TRIAL NO. A-8110286

JOHN FERNEDING,
Plaintiff-Appellant,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee,

and

WILLIAM TARVIN,
Defendant.

MEMORANDUM DECISION AND JUDGMENT ENTRY

(Filed November 23, 1983)

Mr. Steven J. Chabot, 3014 Harrison Avenue, Cincinnati, Ohio 45211, for Plaintiff-Appellant,

Messrs. Dinsmore & Shohl, Carl J. Stich, Jr. of counsel, 2100 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the accelerated calendar of this Court pursuant to App. R. 11.1 and Local Rule 12, and was submitted for decision upon the record from the Court of Common Pleas of Hamilton County, Ohio, and the briefs and arguments of counsel.

The instant appeal is taken from the order of the Court of Common Pleas granting a motion for summary judgment and dismissing a claim for damages against a railroad company that stemmed from an altercation between two of its employees. In the only assignment of error presented to us for review, the issue is whether the trial judge correctly concluded as a matter of law that the company was not liable for the actions of the offending employee under the doctrine of *respondeat superior* as it has been applied to an action brought pursuant to the Federal Employers' Liability Act, 45 U.S.C.A. § 51.

After reviewing the record, we are convinced that the evidence before the court below clearly demonstrated that the actions forming the basis of the claim against the railroad company were motivated by personal malice, that they were not committed in furtherance of the employer's business, and that they constituted in law an intentional tort falling outside the scope of the employment relationship. *See Davis* v. *Green* (1922), 260 U.S. 346, 43 S. Ct. 125; *Young* v. *New York Central Rd. Co.* (8th Dist. 1949), 88 Ohio App. 352, 88 N.E.2d 220. *See also Finley* v. *Schmitt,* No. C-810961, unreported (1st Dist. 1982). For this reason, we must conclude that the claim was properly resolved by summary judgment, and the assignment of error is, accordingly, without merit.

The judgment which this appeal is taken is hereby

affirmed, and it is, therefore, the Order of this Court that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

SHANNON, P.J., KEEFE and DOAN, JJ.

APPENDIX "B"

THE SUPREME COURT OF OHIO

No. 84-98

THE STATE OF OHIO,) 1984 TERM
)
City of Columbus.) To wit: March 21, 1984

JOHN FERNEDING,
Appellant,

vs.

CONSOLIDATED RAIL CORP., et al.,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by S. Chabot.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this ..... day of ....., 19 .....

..... Clerk

APPENDIX "C"

IN THE SUPREME COURT OF
THE STATE OF OHIO
Case No. 84-98

JOHN FERNEDING,

Appellant,

vs.

CONSOLIDATED RAIL CORP., et al.,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Filed June 19, 1984)

Notice is hereby given that John W. Ferneding the Appellant named above, hereby appeals to the Supreme Court of the United States from the final order of this Court, denying Appellant's Motion to certify, entered herein on March 21, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Respectfully submitted,

/s/ HARVEY B. WOODS
Attorney for Petitioner
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CERTIFICATION

I certify that a true copy of the above was delivered by U.S. regular mail service to Carl J. Stich, Jr., Attorney for Defendant-Appellee, Consolidated Rail Corporation (Conrail) 2100 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio, and Dwight A. Pachard, Attorney for Defendant, William Tarvin, 930 Cin-Cols. Road, West Chester, Ohio, 45069, this 19th day of June, 1984.

/s/ HARVEY B. WOODS
Attorney for Petitioner